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No. 05-

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID H. TEDDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Notwithstanding dictum in *Libretti v. United States*, 516 U.S. 29, 49 (1995), do this Court's recent decisions from *Apprendi* (2000) to *Booker* (2005) extend to the determination of criminal forfeiture penalties the Sixth Amendment right to jury trial and related Fifth Amendment right to proof beyond a reasonable doubt?

Alternatively, in avoidance of the constitutional question, is a right to jury trial implicitly granted by the federal criminal forfeiture statutes, and has that right been improperly restricted by recent amendments to the Federal Rules of Criminal Procedure?

2. If, as held by the court below in disagreement with the trial court, the same property, or its value, may not be ordered forfeited criminally from different individuals in separate cases on different statutory bases, may the court of appeals nevertheless affirm a forfeiture judgment entered over such objection on the basis of a rhetorical question (masking a factual assumption) never raised by the government and which the defendant-appellant was never given an opportunity to rebut?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Tedder and respondent United States). There were related prosecutions and appeals in the courts below, but no co-defendants or co-appellants.

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1. The Seventh Circuit's ruling in this case that the judge could redetermine the amount of criminal forfeiture set by the jury, upon conceding errors in the instructions, without granting the defendant a new jury trial, conflicts with decisions of two other Circuits and implicates a question of fundamental importance -- whether there is a constitutional right to jury trial on all facts necessary to make out an allegation of criminal forfeiture 11

2. By allowing the government a double recovery of the same property, the Seventh Circuit's procedurally unfair ruling in this case violates the very essence of criminal forfeiture -- to take the defendant's interest in tainted property, or its equal, and nothing else ... 21

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

David Hampton Tedder respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. The court below affirmed his convictions for money laundering and otherwise assisting a gambling business and consequent judgment of forfeiture, while remanding his sentence of imprisonment.

OPINIONS BELOW

The Seventh Circuit's precedential Opinion (per Easterbrook, J., with Cudahy and Williams, JJ.), was filed April 6, 2005; see *United States v. Tedder*, 403 F.3d 836. A copy is attached as Appendix A. The United States District Court for the Western District of Wisconsin (Crabb, Ch.J.) wrote several opinions, only one of which is germane to this petition. See *United States v. Tedder*, 2003 WL 23204849 (July 28, 2003) (discussing forfeiture verdict). That opinion is reproduced as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit affirming the applicant's convictions on federal money laundering and gambling conspiracy charges was filed and entered on April 6,

2005. Appx. A; see *United States v. Tedder*, 403 F.3d 836. Petitioner moved the court of appeals for an extension of time to petition for rehearing, but the authoring Circuit Judge denied such relief by Order filed April 21, 2005. By order dated June 24, 2005, under No. 04-A-1076, Justice Stevens extended until September 3, 2005 (a Saturday), the time within which to file a petition for certiorari. This petition is being filed on or before the first business day thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTE, AND RULE OF PROCEDURE INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "No person shall ... be deprived of life, liberty, or property, without due process of law ...." U.S. Const., amend. V.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...." U.S. Const., amend. VI.

Section 982 of title 18, United States Code, provides for forfeiture as an additional sentence in connection with certain federal criminal convictions, and states, in pertinent part:

§ 982. Criminal forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

18 U.S.C. § 982(a)(1).

The Federal Rules of Criminal Procedure, as amended in 2000, provide, in pertinent part:

Rule 32.2. Criminal Forfeiture

* * * *

(b) Entering a Preliminary Order of Forfeiture.

(1) In General. As soon as practicable after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the

record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

(2) Preliminary Order. If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(3) Seizing Property. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of that property; and to commence proceedings that comply with any statues governing third-party rights. At sentencing -- or at any time before sentencing if the defendant consents -- the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary

to preserve the property's value pending any appeal.

(4) Jury Determination. Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

* * * *

Fed.R.Crim.P. 32.2(b).

STATEMENT OF THE CASE

A jury convicted petitioner of participating in a money laundering conspiracy, 18 U.S.C. § 1956(h), and of aiding and abetting a conspiracy to transmit wagering information over international wires, 18 U.S.C. §§ 371, 1084. The case arose out of services he rendered as a lawyer for an internet sports gambling business. After receiving further instructions, the jury also rendered a criminal forfeiture verdict under 18 U.S.C. § 982. The court of appeals affirmed both the judgments of conviction and the forfeiture judgment.

a. ***Procedural History***

A grand jury sitting in the Western District of Wisconsin returned an indictment on September 12, 2002, naming petitioner David H. Tedder, a lawyer, in seven counts. Count 1 of the indictment charged that petitioner Tedder conspired with (or aided and abetted a conspiracy involving) Duane Pede, Jeff D'Ambrosia and others from mid-1997 to mid-2000, to violate 18 U.S.C.

§ 1084 (the "Wire Wagering Act"), contrary to 18 U.S.C. §§ 2(a) and 371.[1]

Count 2 charged that during the same time period petitioner participated in a conspiracy with the same persons, in violation of *id.* § 1956(h), to conduct financial transactions with, in each instance, more than $10,000 of the proceeds of what he knew to be criminal activity ("that is sports wagering, in violation of the wire wagering act"), contrary to *id.* § 1957. Counts 3 through 6 accused him of conducting particular transactions in violation of § 1957. Count 7 charged a criminal forfeiture under 18 U.S.C. § 982 of all petitioner's interest in "property involved" in the Count 2 offense (the transactions-with-proceeds conspiracy).

Following a six-day trial in June 2003, the jury convicted petitioner on Counts 1, 2, 5 and 6. He was acquitted on Counts 3 and 4. On the forfeiture count (Count 7), the jury returned a verdict in favor of the government for $7,288,090.49, CA7 App. 118[2], a lesser amount than had been alleged.

Prior to sentencing, in response to a post-verdict motion, Chief Judge Crabb concluded that she had erred

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[1] Prior, related indictments in the Western District, had charged Pede, D'Ambrosia, their company, Gold Medal Sports, N.V., and others with closely related criminal activity. Those defendants were convicted upon pleas of guilty to various offenses. See *United States v. D'Ambrosia*, 313 F.3d 987 (7th Cir. 2002) (affirming sentences of Pede and D'Ambrosia).

[2] "CA7 App." refers to the Joint Appendix filed by petitioner as appellant in the Seventh Circuit.

in several respects in her forfeiture instructions, and reformed that verdict downward (over defense objection that only a new trial would suffice) by some $4.5 million, principally to eliminate transactions which had been counted twice. *See* Appx. B.

At sentencing on August 22, 2003, Chief Judge Crabb imposed Guideline terms of sixty months' imprisonment on each count, running concurrently, three years' supervised release, fines totalling over $1.06 million, plus interest, and $400 in special assessments. As part of the judgment of sentence, the district court also imposed a criminal forfeiture in the amount of $2,765,052. CA7 SA 72[3] (Sent. Tr.), 5 (judgment). Of this amount, $1,050,990 was described as a "personal money judgment." CA7 SA 72. (The $1,714,062 balance was to be forfeited "from Challenge Realty," CA7 SA 72, a corporation which was not a defendant.) Upon entry of this judgment, petitioner filed a timely notice of appeal. The government did not cross-appeal the reduced forfeiture judgment.

On appeal, a Seventh Circuit panel found error in the district court's U.S. Sentencing Guidelines calculation and remanded for resentencing, with proceedings on remand to occur under *United States v. Booker*, 543 U.S. --, 125 S.Ct. 738, 160 L.Ed.2d 621 (Jan. 12, 2005). Appx. A. However, the court also affirmed the $2.8 million criminal forfeiture over petitioner's Sixth Amendment objection to the district court's revision of the jury's forfeiture verdict. Appx. A-8 to -10; 403 F.3d

[3] "CA7 SA" refers what the Seventh Circuit calls the "Short Appendix," as filed by petitioner below.

at 840-41. The court below also accepted the notion of a "personal money judgment" of forfeiture, although that concept is unauthorized by any statute. In addition, the panel rejected petitioner's challenge to the district court's failure to credit his co-conspirators' forfeitures against his own "joint and several" judgment on the basis of a factual theory never relied upon in the district court or advanced by the government on appeal. *Id.* at 841.

This petition follows. The Seventh Circuit's mandate has issued, and Judge Crabb has scheduled the resentencing for November 4, 2005.

b. *Statement of Facts*

Jeff D'Ambrosia and Duane Pede, who both testified for the prosecution, founded, owned and operated Gold Medal Sports ("GMS"), an offshore gaming business. By causing the transmission of betting information from the United States to Curacao by wire, D'Ambrosia and Pede violated 18 U.S.C. § 1084. For this, they were convicted, and each was sentenced to five years' imprisonment. See *United States v. D'Ambrosia*, 313 F.3d 987 (7th Cir. 2002). Petitioner was one of their lawyers. He assisted them with their banking and estate planning.

Originally, Pede and D'Ambrosia each owned 25% of GMS, with 50% owned by other investors. GMS was based in Curacao. An organization called TISS, owned by two American lawyers and the island government, 2B Tr. 145, provided them with a turnkey operation there. 2 Tr. 85. D'Ambrosia and Pede ran GMS from Las Vegas and Wisconsin respectively, however. 2 Tr. 82-88. A majority of GMS's customers were in the U.S.A.,

2 Tr. 73; GMS received payments from them by credit card over the telephone, via Western Union, by personal check, and by wire. 2 Tr. 71.

GMS prospered. In 1997 it made $4.8 million on $8.6 million gross. The 1998 net was $1.9 million, and in 1999 over $700,000. 2 Tr. 95-97.

Petitioner, acting through his law firm "The Legal Advantage," also counseled D'Ambrosia and Pede on estate planning and "asset protection." 2B Tr. 147. "Foreign deferred compensation" accounts he established, 2 Tr. 102, received Pede's and D'Ambrosia's $1.9 million in sports book profits. 3 Tr. 44. When Western Union would no longer provide wire services to Legal Advantage's gaming clients, petitioner looked for other ways to assist in transmitting their money. The Legal Advantage office maintained a "research file" concerning 18 U.S.C. § 1084, the wire wagering law. 2 Tr. 28.

In about March 1998, Pede received a letter from D'Ambrosia about the off-shore sports book operators who were indicted in New York. 2B Tr. 14. Pede believed that GMS was "doing nothing wrong" and was "defensible." 2B Tr. 18.[4] Petitioner told him they had "less to worry about than most." 2B Tr. 19-20; *see also* 3 Tr. 11-13. Tedder suggested that Pede "put some separation between" himself and the ownership of the gambling business. 2 Tr. 116. When D'Ambrosia expressed concern in 1999 about the legality of their operation, Tedder suggested GMS could operate from outside of the United States. 2B Tr. 178; 3 Tr. 3-4. An

[4] The defense was not permitted to explore or develop this testimony on cross-examination. 2 Tr. 69-78.

IRS special agent testified that he traced the transactions described in Counts 2 through 6, and described his findings. 3 Tr. 153-82; 4A Tr. 14-52.

Petitioner testified at trial that he focused his practice on estate planning, both domestic and international, and related corporate matters. *Id.* 66. He resigned from the bar in 2001. *Id.* 94-95. Tedder testified that he believed GMS's gaming operations were entirely legal. 4 Tr. 55-56, 117-18, 170-71. He never knew of any illegality in GMS's activities nor intended to do or assist anyone in doing anything illegal. *Id.* Petitioner believed GMS's operations were completely legal, he testified, because both D'Ambrosia and Tedder himself had repeatedly been assured of this by several individuals who were experts in the areas of internet gaming, advertising, as well as criminal and gaming law. *Id.* 126-29, 170-75.

On rebuttal, the government called adverse character witnesses, including petitioner's two brothers, even though they had been in a dispute with the defendant for some 12 years over their father's estate and had not spoken with petitioner for more than ten years.

c. ***Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)*** The United States District Court for the Western District of Wisconsin had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

REASON FOR GRANTING THE WRIT

1. The Seventh Circuit's ruling in this case that the judge could redetermine the amount of criminal forfeiture set by the jury, upon conceding errors in the instructions, without granting the defendant a new jury trial, conflicts with decisions of two other Circuits and implicates a question of fundamental importance -- whether there is a constitutional right to jury trial on all facts necessary to make out an allegation of criminal forfeiture.

The courts below upheld the judgment of forfeiture, despite petitioner's claim of denial of the right to trial by jury. Several interrelated questions warranting this Court's review are implicated.

Over objection, petitioner was afforded only the limited right to jury trial authorized by Fed.R.Crim.P. 32.2(b)(4), as amended in 2000. This gave to the jury the authority to decide "the requisite nexus between the property and the offense ...."[5] In the case of an alleged sum of money, that "nexus" is nothing but the jury's determination that funds (but not necessarily the amount of funds), were "involved in" the specified offense -- here, a conspiracy in violation of 18 U.S.C. § 1956(h) to violate *id.* § 1957. The Rule does not authorize the court to have the jury determine the essential questions of the exact value of those funds as of the time of the offense and of the nature and extent of the defendant's

[5] See Constitutional Provisions, Statute, and Rule of Procedure Involved, *ante*.

interest, if any, in that sum as of that time. In this case, based on erroneous jury instructions, the jury found that over $7.2 million was "involved" in the offense. The court below held that upon recognizing the instructional errors, the district judge was empowered to redetermine the "nexus" amount herself, without granting a new trial by jury.

The panel's ruling -- on grounds never even suggested by the government in the district court or on appeal -- was that this was authorized because the question to be decided under the Rule:

> (unlike the sixth amendment) is limited to the nexus between the funds and the crime; Rule 32.2 does not entitle the accused to a jury's decision on the amount of the forfeiture. Even if it did, the rule would not foreclose what amounts to summary judgment or remittitur; as those procedures are compatible with the seventh amendment's jury-trial right in civil cases, ...

Appx. A-9, 403 F.3d at 841, citing *Fidelity & Deposit Co. v. United States ex rel. Smoot*, 187 U.S. 315, 319-21 (1902), and *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889) (upholding summary judgments and remittiturs against Seventh Amendment challenges). On the same basis, the Court also affirmed use of a preponderance standard, rather than the criminal-case due process standard of proof beyond a reasonable doubt. Appx. A-9; see also *United States v. Melendez*, 401 F.3d 851, 856 (7th Cir. 2005); *United States v. Bellomo*, 176 F.3d 580, 595 (2d Cir. 1999) (preponderance standard suffices); *United States v. Messino*, 382 F.3d 704, 713 (7th Cir. 2004) (denying right to jury trial).

Under the Federal Rule 32.2, as amended, no determination of the defendant's interest in the forfeitable property -- that is, the amount the statute makes forfeitable from him -- is ever made. Instead, the amount ultimately forfeitable from the defendant is the difference between the whole value of the tainted property and the amount successfully claimed by any third party. *See* Fed.R.Crim.P. 32.2(c). Yet in this case, the government has never given notice to any third party with an apparent interest in the laundered funds (or property traceable thereto), as would be necessary even to begin such proceedings. *See* 21 U.S.C. § 853(n).[6]

Thus, this case implicates constitutional issues of exceptional importance concerning criminal forfeiture, arising in the wake of *Apprendi*, *Blakely v. Washington*, 542 U.S. 246 (2004), and *Booker*: whether the Fifth and Sixth Amendments guarantee the right to jury trial and proof beyond a reasonable doubt for the added penalty of criminal forfeiture. Language in *Libretti v. United States*, 516 U.S. 29, 49 (1995), suggesting they do not was unnecessary to the decision in that case (which involved the requirements for a valid guilty plea), and in any event did not consider the issue crystallized in *Apprendi* and its progeny.

The view of the court below, echoed by several other Circuits, is based on a simple mistake: "There is no statutory maximum forfeiture, so *Apprendi* ... do[es]

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[6] Having failed to follow even this flawed procedural mechanism for determining the defendant's supposed "interest" by default, the government should be judicially estopped from arguing against petitioner's forfeiture issues in reliance on any presumptive validity to the Rule.

not" apply. Appx. A-8; 403 F.3d at 841. Accord, *United States v. Vera*, 278 F.3d 672 (7th Cir. 2002); *United States v. Shryock*, 342 F.3d 948, 991 (9th Cir. 2003); *United States v. Gasanova*, 332 F.3d 297, 301 (5th Cir. 2003).[7] But it is the offense which authorizes a "statutory maximum" as a result of certain facts' being proved. The offense in question is not "forfeiture"; the offense (in this case, for example) is conspiracy to commit money laundering, 18 U.S.C. § 1956(h). "Forfeiture is an element of the sentence ...." *Libretti*, 516 U.S. at 38-39. Forfeiture of "any property ... involved in such offense" is an added criminal punishment or sanction for that offense, 18 U.S.C. § 982(a)(1), imposed with the sentence and included in the judgment. *Id.* §§ 3551(b), 3554; Fed.R.Crim.P. 32.2(b)(3). See *United States v. Bajakajian*, 524 U.S. 321, 328-30 (1998) (forfeiture under § 982 is part of criminal punishment for a listed offense).

Proof of the elements of the § 1956(h) offense charged in this case, without more, implicates a maximum penalty of ten years' imprisonment and a $250,000 fine (which itself can be increased depending on proven facts), *see* 18 U.S.C. §§ 1957(b), 3571(b), as well as a special assessment, *id.* § 3013, but not a forfeiture. This is so because on the facts minimally necessary to prove the conspiracy alone, no actual "property" need have been "involved in" the offense at all. See *Whitfield*

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[7] Oddest of all these cases is *United States v. Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001) (per curiam), which "reasons" that *Apprendi* does not apply to forfeiture because forfeiture is a punishment.

v. United States, 543 U.S. --, 125 S.Ct. 687, 690 (Jan. 11, 2005) (no requirement of overt act under § 1956(h)). Forfeiture thus increases the maximum sentence otherwise available for the money laundering conspiracy offense, and does so on the basis of proof of additional facts.

If facts warranting forfeiture (such as the defendant's receipt of proceeds) are not established, the punishment cannot include any forfeiture of property; if those additional facts are proven, then the punishment is increased to include a forfeiture. In this case, because of the additional facts made relevant by the forfeiture allegation, petitioner was hit with a monetary penalty of $2.8 million that could not have been imposed upon him based on the jury's offense verdicts alone.

The ground on which this point was decided in the court below is as fallacious as holding that a statute which allows a sentence of life imprisonment if a death results from the offense, but only a term of years if it does not, does not make the causation of death a fact which triggers rights under *Apprendi* or *Ring v. Arizona*, 536 U.S. 584 (2002), because a life sentence "has no maximum." To correct the lower courts' significant failure to follow this Court's controlling precedent, the writ should be granted.

The same line of precedent defeats the Seventh Circuit's conclusion in this case that criminal forfeiture allegations need not, under the Fifth Amendment's Due Process Clause, be proven beyond a reasonable doubt, even putting aside any right to trial by jury of such aver-

ments.[8] Three other circuits have recognized this as a critical and separate issue. See *United States v. Cianci*, 378 F.3d 71, 107 (1st Cir. 2004); *United States v. Fruchter (Appeal of Braun)*, 411 F.3d 377 (2d Cir. 2005); *United States v. Neal*, No. 03-4982 (4th Cir.) (pending argument). See also *United States v. Visinaiz*, 344 F.Supp.2d 1310, 1316 (D.Utah 2004) (Cassell, J.), *citing* Nancy King & Susan Klein, "Beyond Blakely," 16 Fed. Sent.Rptr. 316 (2004); 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶14.03A, at 14-52 to -56 (2005 rev.).

The particular way in which the court below affirmed the trial court's action to defeat petitioner's right to jury trial in this case conflicts with the published decisions of two other Circuits. In *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998), the jury's verdict erroneously forfeited the funds contained in Bornfield's business account, instead of his personal account, when the latter contained the funds "involved in" the money laundering offense. *Id.* 1136-38. After discovering this mistake, the district court tried to correct the error by ordering the forfeiture of the business account as "substitute assets." The Tenth Circuit reversed, holding that "the court cannot grant forfeiture based on § 982(a)(1) absent a waiver of jury trial on the issue of forfeiture ...." *Id.* 1138-39.

Similarly, in *United States v. Gilbert*, 244 F.3d 888, 920-22 (11th Cir. 2001), the jury verdict found that an entire casino worth about $150 million was subject to

[8] Accord, *United States v. Najjar*, 300 F.3d 466, 485-86 (4th Cir. 2002).

forfeiture as the proceeds of racketeering activity. The three defendants, however, were not the casino's exclusive owners. The trial court sought to correct its admitted jury charge mistake by interpreting the verdict as limited to the defendants' interests in the casino. The Eleventh Circuit reversed, citing *Bornfield*.

In this case, the district court's action in redetermining the amount of the money judgment forfeiture went far beyond the re-characterization of the verdicts in *Bornfield* and *Gilbert*. In those cases, the courts merely corrected manifest errors in the jury verdicts in a way that did no substantive harm to the defendants. Those defendants could not argue that the refashioned forfeiture orders actually deprived them of property to which they were entitled. Petitioner's case is far worse. Absent a waiver, the trial court had no authority to deprive petitioner of his right to jury trial.

Libretti's brief analysis of the issue was based on the now-rejected notion that, with the exception of the death penalty, a jury plays absolutely no role in sentencing and that therefore the Sixth Amendment simply has no application:

> [T]he nature of criminal forfeiture as an aspect of sentencing [rather than an element of the offense] compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection. Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed. *See, e.g., McMillan v.*

Pennsylvania, 477 U.S. 79, 93 (1986) ('[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.').

Libretti, 516 U.S. at 49.[9]

To review that passage is to see clearly how *Libretti*'s understanding of the scope of the Sixth Amendment has been repudiated by the line of cases beginning with *Apprendi*. It is no surprise, therefore, that not a single opinion of this Court has cited *Libretti*'s two paragraph statement regarding the Sixth Amendment's irrelevance to sentencing. Even the dissenters in the *Apprendi* line of cases have not cited *Libretti*. The case has become "a derelict on the waters of the law." See *Texaco, Inc. v. Short*, 454 U.S. 516, 537 n.33 (1982), quoting *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting). It has even less persuasive force today than the case *Libretti* relied upon, *McMillan v. Pennsylvania*. While *McMillan* has not yet been explicitly overruled either,[10] no court today would sensibly rely on its sweeping pronouncement that the right to jury trial under the Sixth Amendment is irrelevant to sentencing.

The historical pedigree for recognizing a Sixth Amendment (or at least a Due Process) right to jury trial

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[9] Justices Souter and Ginsburg did not join in the portion of *Libretti* dealing with the Sixth Amendment right to a jury trial in criminal forfeiture cases. 516 U.S. at 52-54 (Souter and Ginsburg, JJ., concurring in part and concurring in the judgment).

[10] See *Harris v. United States*, 536 U.S. 545 (2002).

of all factual issues in criminal forfeiture is impressive. The Sugar Act of 1764 transferred jurisdiction of some forfeiture matters arising in the Colonies from the Court of the Exchequer to the admiralty courts, with the effect of denying any right to jury trial. This Parliamentary maneuver gave rise to one of the grievances against the Crown expressed in the Declaration of Independence.[11] See *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 464 & n.19 (7th Cir. 1985).

Many lower court decisions issued before (and even after) *Libretti* recognized on statutory grounds that the government's burden of proof in some or all criminal forfeiture cases was beyond a reasonable doubt. *E.g., United States v. $814,254.76 in U.S. Currency*, 51 F.3d 207, 211 (9th Cir. 1995) (beyond a reasonable doubt standard applies to criminal forfeitures under 18 U.S.C. § 982(a)); *United States v. Pellulo*, 14 F.3d 881, 902-06 (3d Cir. 1994) (comprehensive discussion showing that RICO forfeiture must be proved beyond a reasonable doubt)[12]; *United States v. Wiley*, 997 F.2d

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[11] "... For depriving us, in many cases, of the Benefits of Trial by Jury, ..." From Common Law times through the era of the Framing, there was never any question of the right to jury trial on criminal forfeiture penalties, then known as "forfeiture of estate." See *United States v. Bajakajian*, 524 U.S. 321, 332 & n.7 (1998) (First Congress rejected criminal forfeitures entirely in 1790). Ironically, the right to jury trial under the Seventh Amendment for civil, *in rem* forfeiture proceedings is now better secured than that for criminal cases. *See* 1 D.B. Smith, *supra*, ¶11.01, at 11-2 to 11-4.

[12] The legislative history of contemporary criminal forfeiture statutes also reveals Congress's belief that juries would be

378, 384 (8th Cir. 1993) (reasonable doubt standard applies to facilitation forfeiture under 21 U.S.C. § 853(a)(2)); *United States v. Horak*, 833 F.2d 1235, 1243 (7th Cir. 1990) (government concedes burden in RICO forfeiture is beyond a reasonable doubt, and court agrees); *United States v. Dunn*, 802 F.2d 646, 647 (2d Cir. 1986) (criminal forfeiture under 21 U.S.C. § 848 requires proof beyond a reasonable doubt).

The requirements of the Sixth Amendment thus are congruent here with ancient custom as well as the intent of the modern criminal forfeiture statutes. Congress could hardly object to applying *Booker* to criminal forfeiture.[13] To the contrary, it was the lower court cases "following" *Libretti*, as if that constitutional dictum affected prior statutory analysis, that departed from the congressional forfeiture scheme.

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required to find the facts necessary to support criminal forfeiture beyond a reasonable doubt. *Id.*, 14 F.3d at 903-06 (court also cites DoJ manual on RICO prosecutions, which acknowledged that burden of proof regarding forfeiture was beyond a reasonable doubt); S. Rep. No. 98-225, 98th Cong., 2d Sess. 193 (1983) ("Since the United States will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt, the burden of proof at the [ancillary] hearing will be on the third party."); H. Rep. No. 845, 98th Cong., 2d Sess. 18, 38 (1984).

[13] A Congressional committee spoke to the issue as recently as 2000, in connection with enactment of the Civil Asset Forfeiture Reform Act. *See* Senate Staff Report on S.1931, Civil Asset Forfeiture Reform Act 14 (2000) ("the government must prove beyond a reasonable doubt that property is subject to criminal forfeiture").

The exceptional importance of this issue is evident, and the analysis of the more recent lower courts is highly dubious. Yet because of the existence of the on-point language in *Libretti*, only this Court can correct the constitutional error. See *Fruchter (Braun)*, 411 F.3d at 380, citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); see also *Tenet v. Doe*, 544 U.S. --, 125 S.Ct. 1230, 1237 (2005).

For these reasons, the Court should grant the requested writ of certiorari and reverse the judgment of the court below.

2. By allowing the government a double recovery of the same property, the Seventh Circuit's procedurally unfair ruling in this case violates the very essence of criminal forfeiture -- to take the defendant's interest in tainted property, or its equal, and nothing else.

It is fundamental that a criminal forfeiture achieves divestiture, as part of the sentencing following a conviction, of the defendant's interest in specific property which a statute makes forfeitable. Ultimately, in both criminal and civil forfeiture law, what is forfeitable is tainted property, although civil forfeiture takes the *res* (without focusing on individual guilt), while criminal forfeiture approaches the divestiture by taking the interests in that property of particular, guilty individuals. See generally *United States v. Bajakajian*, 524 U.S. 321, 328-33 (1998). The decision of the court below on the issue of joint and several liability fails to attend to this fundamental understanding, warranting this Court's review.

Necessarily, even if the same property or property interest is forfeitable for more than one reason, that interest can only be forfeited once. Moreover, if more than one person should have an interest in an item or unit of forfeitable property, and all of that property is forfeited from one of them, then the other, by simple logic, cannot also suffer an additional criminal forfeiture of an interest in the same property. In this case, the only property alleged in the indictment to be forfeitable was petitioner's interest, if any, in the funds which were "involved in" the Count Two offense. That offense was a conspiracy between March 1997 and April 2000 to conduct monetary transactions of $10,000 or more each with the proceeds of specified unlawful activity. The funds which were allegedly "involved" in those transactions were, of course, the proceeds of the related defendants' illegal, offshore gambling business. CA7 App. 29 (indictment: defendants "moved in excess of $10,662,000 in GMS proceeds" in "transactions each exceeding over [sic] $10,000"), 33 ($10,662,179 alleged to be forfeitable as "property involved in such offense").

At the time the district court ordered the judgment of criminal forfeiture against petitioner Tedder, the government had already collected up to $286,000 from a bank account in Waupaca, Wisconsin, in the name of co-conspirator Hanson Meagher and $3,247,859.75 from co-conspirator GMS pursuant to a plea agreement, as forfeitable property derived from the same criminal conduct. Accordingly, petitioner submitted that these sums should be deducted from any amount he would otherwise owe the United States under a theory of joint and several liability. After all, the government could not

collect the same sums twice from the different conspirators. As his own liability (according to the district court) was less than had already been collected, the government was not entitled to forfeit anything more from Tedder under the joint and several liability theory, he argued. The district court disagreed, holding that petitioner was not entitled to credit because the forfeiture from GMS was ordered under RICO, a different statute.

Petitioner argued on appeal that since criminal forfeiture operates against tainted assets, if certain proceeds are taken from one perpetrator, neither those assets nor their value in substitute assets can also be taken from another in satisfaction of a joint and several liability. Rejecting the government's counter-arguments, the court below accepted this premise. Appx. A-9, 403 F.3d at 841 ("If the United States already has all the boodle, having collected it from Pede and D'Ambrosia, then the funds in Tedder's hands (or Colonial [sic; *i.e.*, Challenge] Realty's accounts) cannot also be traceable proceeds."). The panel nevertheless declined to reverse the excessive penalty, relying on a rhetorical question:

> But if Pede and D'Ambrosia have surrendered all of the venture's profits, as Tedder insists, what does the $1.7 million in the Colonial [sic] Realty account represent? ... And if Pede and D'Ambrosia have disgorged all of the venture's profits, how could Tedder himself hold $1.1 million that, the judge found, is traceable to gambling profits?

Appx. A-10, 403 F.3d at 841. These questions -- not posed by the district court or by the government in its

brief on appeal, and therefore never addressed before issuance of the Seventh Circuit's decision -- are readily answered, defeating the panel's attempted logical deflection of petitioner's argument.

As courts have long recognized, see *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985) (en banc), what a defendant is required to give up in satisfaction of a criminal forfeiture order need not be the actual proceeds of the offense, and the defendant need not even be in actual possession of those proceeds any longer when ordered to pay. So in the case of Pede and D'Ambrosia, when they entered their plea agreements, they agreed to pay (and when sentenced did pay) a sum deemed to be equal to the illegal proceeds they had reaped, generated by the sale of the entire GMS business; they did not "disgorge" the actual funds. The very same illegal proceeds, according to Judge Crabb, had since passed into petitioner Tedder's hands, where they were utilized in transactions made criminal by the money laundering statutes. On that separate basis, the same proceeds (again, not really those proceeds, but rather a sum of money equal to them in value) were ordered forfeited by petitioner, from his own assets and those of Challenge Realty, which the trial court found he controlled. As the court below recognized in principle, but not in practice, this was unlawful.

The amount even potentially jointly due as forfeiture from David Tedder should have been reduced by the $3,247,859.75 that the government had already collected from the sale of GMS on December 6, 2001.[14]

[14] We say "even potentially" because identification of that sum would still beg the question of petitioner's interest in those

GMS founders Pede and D'Ambrosia forfeited that money under the RICO statute as part of a plea agreement.[15] CA7 App. 103. As Chief Judge Loken observed in his concurring opinion in *United States v. Covey*, 232 F.3d 641, 650 (8th Cir. 2000), the government may collect the full amount of joint and several liability only once. In *Covey*, one co-conspirator was convicted of drug dealing and the other of money laundering. Likewise here, it made no difference whether the government charged conspirator #1 criminally with RICO forfeiture, 18 U.S.C. § 1963(b), #2 with a money laundering forfeiture, 18 U.S.C. § 982, and conspirator #3 with an *in rem* proceeds forfeiture under 18 U.S.C. § 981(a)(1)(C).

The district court dismissed Judge Loken's opinion as "dictum," distinguishable on the formalistic ground that in *Covey* the two wrongdoers were charged in the same case whereas Tedder and GMS were charged in

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funds, if indeed he ever had any personal "interest" in funds he handled for Gold Medal Sports as its fiscal agent and attorney. *See* page 12-13 and note 6 *ante*; *Bajakajian*, 524 U.S. at 328 n.3.

[15] The government allowed the co-defendants to sell GMS to a Costa Rican gambling operation for $3 million, which was then forfeited. GMS was sold as a going concern; it was not dissolved. *Cui bono?* GMS remains in business to this day -- the same illegal business, that is, according to the government's interpretation of 18 U.S.C. § 1084. Perhaps the government, having reaped the proceeds once, hopes to do so again some time.

separate cases. Appx. B-11.[16] Neither the government nor the court asserted that the $3,247,859.75 forfeited by GMS as racketeering proceeds was not counted by the jury in arriving at a verdict of $7,288,090.49 in laundered proceeds; the government put the evidence supporting the GMS forfeiture before Tedder's jury, too, and they presumably relied on it.

Despite the district court's repeated assertions, Appx. B-4, B-5, B-10, it was not money laundering "proceeds" that petitioner Tedder was ordered to forfeit. Rather, petitioner was ordered to forfeit "property involved" in certain money laundering transactions, and that "property" consisted of the proceeds and profits of the illegal gambling activities of GMS, not of the "money laundering" activity. Thus, what Pede and D'Ambrosio forfeited from the proceeds of the sale of GMS was exactly what petitioner was ordered to forfeit.

The total amount of illegal proceeds laundered in the conspiracy -- according to the government's own calculations -- was $2.765 million, assessed against Tedder under the harsh theory of joint and several liability. If the entirety of the forfeitable property has already been forfeited (and more) -- either civilly (*in rem*) or criminally from some other particular defendant -- then nothing more can be collected from anyone in satisfaction of that claim of forfeiture. The sum of the interests of multiple persons in tainted property simply

[16] Curiously, co-conspirator Meagher's $250,000 forfeiture, which the district court did offset, also occurred under the RICO statute and in a separate case.

cannot exceed 100% of the value of that property.[17]

Since the proceeds of GMS's illegal gambling activity cannot lawfully be seized more than once, regardless of who had an interest in them at various times and regardless of whether and how often they were knowingly moved through a bank, petitioner was entitled to an offset. In this respect, a criminal forfeiture is fundamentally different from a fine. To the extent that this Court may hold that a trial court does have the power to modify the forfeiture verdict without a jury retrial, see *United States v. Descent*, 292 F.3d 703, 707 (11th Cir. 2003), then it should order a remand with directions to reduce the jury-determined amount by this sum as well.

The willingness of the courts below to overlook that the same property was being ordered forfeited more than once derived from their failure to confront a serious and important question as to whether so-called "personal money judgments" -- such as the one in this case -- are even *authorized* by the criminal forfeiture statutes.[18] The decisions to the contrary ignore (*inter*

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[17] Nor was joint and several liability even appropriate with respect to $718,000 in transactions with which petitioner had no involvement. See *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995); *United States v. Barajas*, 200 F.Supp.2d 575 (E.D.N.C. 2002). That would have reduced the amount of his forfeiture, if not already negated, by another $718,000.

[18] Although many courts and defendants have silently acquiesced in the government's demand for a "personal money judgment" against the defendant in lieu of a forfeiture judgment ordering the forfeiture of the defendant's proven interest in specific tainted property, no court has persuasively

alia) not only the essential character of the criminal forfeiture remedy, as discussed above, but also a line of this Court's cases holding that "[t]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional [judicially inferred] remedies." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 93-94 (1981).[19] "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for

(cont'd)

justified this practice. Although the Judicial Conference (by close vote) inserted an unfortunate reference to the notion into the revised Rule 32.2(b)(1), in language which expressly defeats any claim to a jury trial (*see* Rule Involved, *ante*), the Advisory Committee Note carefully reminds the reader that the Conference has taken no position on the concept's validity, thus avoiding a substantial question under the Rules Enabling Act, 28 U.S.C. § 2072(b). A careful consideration of the language, structure, history and purpose of the criminal forfeiture statutes demonstrates that such personal money judgments are not authorized (or at least that the courts have allowed such judgments to exceed their proper scope, as in this case). *United States v. Croce*, 334 F. Supp.2d 781 (E.D.Pa. 2004), *adhered to on reconsideration*, 345 F. Supp.2d 492 (E.D.Pa. 2004). *Croce* is actually the first opinion that carefully analyzes the issue.

[19] See also *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701, 732 (1989); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981); *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974).

enforcement." *Id.* 97.[20]

If Congress wished to provide for the imposition of "personal money judgments" in lieu of forfeiture of a defendant's interest in specific assets, it would have done so explicitly. Instead, it provided a wholly different set of remedies, *i.e.*, the substitute asset provisions, 21 U.S.C. § 853(p), made applicable here by 18 U.S.C. § 982(b), to deal with situations where the tainted assets are no longer available for forfeiture. No reference to a "personal money judgment" appears in any of the criminal forfeiture statutes.

The Court should not let this overreaching stand. With the forfeiture remedy in mind, this Court has recognized that "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *United States v. Good Real Property*, 510 U.S. 43, 56 (1993), quoting *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., concurring). As the First

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[20] Accord *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614 (1981) ("The comprehensive character of the procedures outlined ... precludes the fashioning of an entirely new set of remedies to deal with an aspect of a problem that Congress explicitly addressed."). The government itself acknowledged that these principles apply to RICO when it argued, in *Scheidler v. NOW*, 537 U.S. 393 (2003), that private litigants may not obtain relief under 18 U.S.C. § 1964(a) because RICO is a carefully crafted remedial scheme whose text, structure and legislative history all compel the conclusion that Congress intended to create certain remedies and withhold others. U.S. Br. at 7 (available at http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2001-1118.mer.ami.pdf).

Circuit put it, "the very potency of the forfeiture power demands that it be reasonably contained within ascertainable limits." *United States v. Saccoccia*, 354 F.3d 9, 14 (1st Cir. 2003). The Court should grant certiorari, vacate the judgment of the Seventh Circuit, and remand with directions to reverse the forfeiture aspect of petitioner's sentence.

CONCLUSION

For the foregoing reasons, petitioner DAVID H. TEDDER prays that this Court grant his petition for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Seventh Circuit affirming the sentence of criminal forfeiture.

Respectfully submitted,

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Attorneys for Petitioner

September 6, 2005.

APPENDIX A

Cite as: 403 F.3d 836

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-3345

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID HAMPTON TEDDER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 02-CR-105-C-01 -- **Barbara B. Crabb**, *Chief Judge*

ARGUED FEB. 23, 2005 -- DECIDED APRIL 6, 2005

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*837 Daniel J. Graber (argued), Office of the United States Attorney, Madison, WI, for Plaintiff-Appellee.
*838 Peter Goldberger (argued), Ardmore, PA, for Defendant-Appellant.

Before CUDAHY, EASTERBROOK, and WILLIAMS, Circuit Judges.

EASTERBROOK, Circuit Judge.

For using his law license to help offshore gambling businesses conceal their identities and income, David

Tedder has been convicted of conspiring to defraud the United States, see 18 U.S.C. § 371, by assisting a wagering enterprise that violated 18 U.S.C. § 1084, plus three counts of money laundering, see 18 U.S.C. § 1956(h), § 1957. No longer a member of the bar, Tedder is serving a sentence of 60 months' imprisonment and has been fined more than $1 million; the district court also ordered almost $2.8 million to be forfeited. (Tedder resigned from the California bar to forestall resolution of disciplinary charges. He has been enjoined from practicing law in Florida, which he had done there despite his lack of a license. *Florida Bar v. Tedder*, 790 So.2d 1110 (2001) (table).)

Section 1084(a) is a simple statute, providing: "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers," commits a crime. Tedder created and operated a business called Clear Pay to move money between gamblers in the U.S. and a Curacao business called Gold Medal Sports, which Tedder's clients operated as a sports book. The Attorney General of Florida had warned Western Union not to wire funds to Gold Medal Sports; Clear Pay offered a solution by preventing Western Union (and other intermediaries) from learning the funds' ultimate destination. Tedder also created Bahamian shell corporations, purportedly

engaged in software development, to help his clients hide their involvement, and wired the gambling business's profits to nominee accounts of which he was the custodian, plus other foreign investments with a patina of legitimacy.

Tedder told his clients that the disguise would be impenetrable. He was wrong. The clients (Duane Pede and Jeff D'Ambrosia) were caught, pleaded guilty, and testified against Tedder -- who contended that he had been *so* mistaken that he had not appreciated the legal problem. Although he was a lawyer, knew about § 1084, and even knew about criminal prosecutions of similar ventures (after which he whipped up still more layers in a futile attempt to shield his clients), Tedder told the jury that he thought that Gold Medal Sports and Clear Pay were upstanding businesses operated in compliance with all laws. This was essentially the tax protester's defense that he just didn't think that the law, however clear, applied to his endeavors. See *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). The district judge gave appropriate instructions to the jury, which did not believe Tedder's professions of ignorance and convicted him. Tedder maintained that he drew his understanding of federal law from observing conduct -- Gold Medal Sports was not the only offshore gambling enterprise -- as if the existence of bank robberies shows that it is lawful to steal money at gunpoint. Testimony about this curious approach to legal "research" did more to demonstrate Tedder's mendacity than to make out a defense. His multifarious endeavors to hide the source and disposition of Gold Medal Sports' funds revealed his true beliefs.

*839 Tedder does not contest the sufficiency of the evidence. Instead he contends that the district judge erred in rulings about evidence. His lead argument is that the judge should have allowed him to present additional witnesses who would have testified that they do not think that § 1084 prohibits the sort of transactions in which Tedder engaged. (Section 1084 is not itself a specific-intent crime, but only a person who knows that the money has an unlawful source commits the offense of money laundering.) Tedder did not propose to present an advice-of-counsel defense based on what other persons told him. Had he done that, he would have been required to waive the attorney-client privilege and allow the prosecutor access to everything he said to his advisers and what they told him in return. Instead he wanted to show only that his (asserted) belief was widely shared by lay persons. How non-lawyers' misunderstandings could have reflected on a lawyer's legal analysis puzzled the district judge -- it was at best weak circumstantial evidence about how the statute was understood. So the judge exercised her authority under Fed.R.Evid. 403 to curtail tangential or cumulative evidence and said that she would limit to two (or one plus Tedder himself, should he testify, as he did) the number of such witnesses. Tedder replied that two witnesses on this subject would suffice, thus waiving the argument he now advances.

By testifying, Tedder put his veracity at issue. To address that subject, the prosecutor called three witnesses who testified that Tedder is not a truth-teller. Under Fed.R.Evid. 608(a), this evidence had to take "the form of opinion or reputation" rather than specific

instances of deceit. One witness, a lawyer, testified that Tedder's reputation for truthfulness in the legal community was "poor." Tedder's brothers were the other two witnesses; both testified that they had low opinions of his honesty. He contends that the family had been estranged for so long that the brothers' views were out of date, but honesty is more like climate than like weather: it is a stable attribute even though subject to daily variability. Rule 608(a) does not contain a time limit, so the fact that Tedder had not spoken with his brothers for a decade did not compel the judge to block them from testifying. See *United States v. Pacione*, 950 F.2d 1348, 1354 (7th Cir. 1991). The long break in family relations was a subject for cross-examination and argument by counsel. As for the fact that the questions and answers used the word "honesty" rather than "truthfulness" (the language of Rule 608): lay jurors would be unlikely to perceive a difference, and neither did Tedder's lawyer, who failed to object. Using the vernacular was not plain error. See *United States v. Manske*, 186 F.3d 770, 775-76 (7th Cir. 1999).

The district judge told the jury to consider character evidence "in the same way as all the other evidence in the case." That came from instruction 3.06 in the circuit's pattern jury instructions, captioned "Character and Reputation of Defendant." Tedder says that the judge instead should have used instruction 3.12, captioned "Character of a Witness." Tedder was both a witness and the defendant, so both versions could be apt. But the two instructions are materially identical. Instruction 3.12 would have told the jury to "consider this evidence in deciding what weight you will give to

Tedder's testimony." Both 3.06 and 3.12 are uninformative; their only use is in implying no special rules govern character and reputation evidence. See *United States v. Burke*, 781 F.2d 1234, 1238-42 (7th Cir. 1985). The jury got that message, and there was no other to convey, so the two instructions were equally good (or equally inconsequential).

*840 Tedder proposed to call a reputation witness of his own on rebuttal. The district judge said no, because the only witness Tedder tendered had been in the courtroom during the trial, and the judge had entered an order forbidding testimony by anyone who had listened to other witnesses. See Fed.R.Evid. 615. Tedder now says that the judge should have disregarded that order, but she did not abuse her discretion in sticking to it. Cf. *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) (enforcement of alibi-notice rule is compatible with due process even when it leads to preclusion of main defense evidence); *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). If Tedder wanted this witness available for rebuttal, he should have kept him out of the courtroom. Or counsel could have called someone else -- if there was anyone else who would testify under oath that Tedder had a good reputation for truthfulness.

We turn to sentencing and start with the fine. Although the Guidelines' fine table prescribes a maximum of $100,000 for someone with Tedder's offense level, there is an exception when the statute authorizes a fine exceeding $250,000. See U.S.S.G. § 5E1.2(c)(4). Money laundering in violation of § 1957 is such a statute, as the Sentencing Commission recog-

nized. See U.S.S.G. § 5E1.2 Application Note 5. Section 1957(b)(2) authorizes a fine "of not more than twice the amount of the criminally derived property involved in the transaction." This governs whether the offense is money laundering or conspiracy to commit money laundering, for the conspiracy statute provides: "Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. § 1956(h). One of the counts on which Tedder has been convicted entailed conspiring to launder $280,070 in proceeds, and another entailed the substantive offense of laundering $250,000. Doubling these produces a statutory maximum high enough to authorize the fine, without needing to consider the $250,000 maximum fines available on the other counts.

Tedder submits that adding the caps from the two counts is a form of double counting, but we do not see why. He does not contend that the counts are multiplicitous or that cumulative punishment is inappropriate under *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Conspiracy and the completed offense are separate crimes. That all money laundering counts were grouped under § 3D1.1 for the purpose of determining Tedder's offense level (and thus his imprisonment) is irrelevant. Although the fine table normally links the fine to the offense level, § 5E1.2(c)(4) breaks that linkage whenever a statute authorizes a fine exceeding $250,000. See *United States v. Ming Hong*, 242 F.3d 528, 533 (4th Cir. 2001). The grouping rules therefore do not constrain Tedder's fine. Both the

statutes and the guidelines authorized the judge to proceed as she did.

The jury determined that Tedder had received funds that are subject to forfeiture under 18 U.S.C. § 982, and it liquidated the forfeitable proceeds at about $7.3 million. Later the district judge concluded that errors in the instructions had led the jury to miscalculate, and she reduced the forfeiture to roughly $2.8 million. About $1.7 million of this comes from funds held by Challenge Realty, one of the vessels that Tedder had created to hold the venture's profits, and the rest stands as a personal money judgment against Tedder to be satisfied out of assets that he had purchased with the tainted proceeds. See *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985) (en banc) (discussing *841 tracing and substituted assets in the law of forfeiture). Tedder insists that the alteration of the jury's award deprived him of his right to a jury trial, but the sixth amendment does not apply to forfeitures. See *Libretti v. United States*, 516 U.S. 29, 49, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995); *United States v. Vera*, 278 F.3d 672 (7th Cir. 2002). (There is no statutory maximum forfeiture, so *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its successors, including *United States v. Booker*, 543 U.S. ---, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), do not alter this conclusion. See *United States v. Swanson*, 394 F.3d 520, 526 (7th Cir. 2005); *United States v. Messino*, 382 F.3d 704, 713 (7th Cir. 2004).)

Although Fed.R.Crim.P. 32.2 offers the defendant a jury trial, this provision (unlike the sixth amendment) is limited to the nexus between the funds and the crime;

Rule 32.2 does not entitle the accused to a jury's decision on the amount of the forfeiture. Even if it did, the rule would not foreclose what amounts to summary judgment or remittitur; as those procedures are compatible with the seventh amendment's jury-trial right in civil cases, see *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21, 23 S.Ct. 120, 47 L.Ed. 194 (1902); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 9 S.Ct. 458, 32 L.Ed. 854 (1889), they must be compatible with a jury-trial right that rests on a rule of procedure alone. Thus the judge has the power to reduce the jury's excessive award without offering Tedder a new trial -- but the final award still must find support in the preponderance of the evidence.

According to Tedder the forfeiture is untenable because he is jointly and severally liable with Pede and D'Ambrosia, who agreed to forfeit more than $3 million as part of their own criminal punishment. Credit that against what Tedder owes and the balance is zero. The district court thought otherwise because the forfeiture ordered against Pede and D'Ambrosia rests on the Racketeer Influenced and Corrupt Organizations Act rather than on the money laundering statutes. That's not a sufficient reason, if Pede and D'Ambrosia already have coughed up the full profits of the venture. Forfeiture reaches proceeds themselves and any traceable substitute assets. 21 U.S.C. § 853(p)(2), 18 U.S.C. § 982(b)(1). It differs in this respect from a fine. If the United States already has all of the boodle, having collected it from Pede and D'Ambrosia, then the funds in Tedder's hands (or Colonial Realty's accounts) cannot also be traceable proceeds.

But if Pede and D'Ambrosia have surrendered all of the venture's profits, as Tedder insists, what does the $1.7 million in the Colonial Realty account represent? Both the jury and the district judge concluded that it is gambling proceeds that Tedder had squirreled away, and he does not now argue that this finding is inadequately supported. And if Pede and D'Ambrosia have disgorged all of the venture's profits, how could Tedder himself hold $1.1 million that, the judge found, is traceable to gambling profits? The district judge's concrete findings establish that the $2.8 million forfeited in this prosecution is distinct from the assets that Pede and D'Ambrosia have surrendered. The judge rejected the prosecutor's argument that funds passed from Pede or D'Ambrosia to Tedder could be forfeited twice (this was the flaw in the jury's award); the $2.8 million represents only proceeds that came to rest with Tedder or one of the entities he controls. There is no reason to disturb the district judge's disposition of the forfeiture question.

The sentence of 60 months' imprisonment is near the high end of a range *842 (51 to 63 months) that the Guidelines prescribe for someone with offense level 24 and criminal history category I, where the district judge placed Tedder. Three of the offense levels are contested. The district judge added two under U.S.S.G. § 2S1.1(b)(2)(B) because Tedder had been convicted under § 1956, which forbids conspiracy to commit money laundering. This is one level more than § 2S1.1-(b)(2)(A) prescribes for someone convicted under § 1957, the substantive laundering offense. Tedder contends that he should have been treated as a substantive offender under § 2S1.1(b)(2)(A). And if he prevails

on that issue two more levels must be deducted. Guideline 2S1.1(b)(3) adds two levels if the laundering was sophisticated (as the district judge found) *and* the increase under subsection (b)(2)(B) also has been applied. Knock out the extra level from subsection (b)(2)(B), and two levels from subsection (b)(3) go as well. Then Tedder's offense level would be 21 and the guideline range would be 37 to 46 months' imprisonment.

Avoiding the application of subsection (b)(2)(B) seems hard to do, because Tedder *has* been convicted of conspiracy to commit money laundering, and subsection (b)(2)(B) therefore applies according to its terms. But did the Sentencing Commission really prescribe a two-level increase for all who conspire to launder criminal proceeds? Application Note 3(C) to § 2S1.1 reads: "Non-Applicability of Enhancement. -- Subsection (b)(2)(B) shall not apply if the defendant was convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957." That describes Tedder's situation precisely: he has been convicted under § 1956(h), and the sole object of that conspiracy was the substantive offense specified in § 1957.

Declining to apply Application Note 3(C), the district judge deemed it limited to cases in which the base offense level is unrelated to any other crime. How the district judge reached this conclusion requires a bit of background.

Guideline 2S1.1(a) specifies the base offense level. Here it is:

(1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) 8 plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

Application Notes 2 and 3 correspond to subsections (a)(1) and (a)(2). To provide context, we reproduce them in full:

2. Application of Subsection (a)(1). --

(A) Multiple Underlying Offenses. -- In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to § 1B1.5 (Interpretation of References to Other Offense Guidelines).

(B) Defendants Accountable for Underlying Offense. -- In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be accountable for the underlying offense

under § 1B1.3(a)(1)(A). The fact that the defendant was involved in laundering criminally derived funds after *843 the commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

(C) Application of Chapter Three Adjustments. -- Notwithstanding § 1B1.5(c), in cases in which subsection (a)(1) applies, application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline (i.e., the laundering of criminally derived funds) and not on the underlying offense from which the laundered funds were derived.

3. Application of Subsection (a)(2). --

(A) In General. -- Subsection (a)(2) applies to any case in which (i) the defendant did not commit the underlying offense; or (ii) the defendant committed the underlying offense (or would be accountable for the underlying offense under § 1B1.3(a)(1)(A)), but the offense level for the underlying offense is impossible or impracticable to determine.

(B) Commingled Funds. -- In a case in which a transaction, financial transaction, monetary transaction, transportation,

transfer, or transmission results in the commingling of legitimately derived funds with criminally derived funds, the value of the laundered funds, for purposes of subsection (a)(2), is the amount of the criminally derived funds, not the total amount of the commingled funds, if the defendant provides sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process. If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds, for purposes of subsection (a)(2), is the total amount of the commingled funds.

(C) Non-Applicability of Enhancement. -- Subsection (b)(2)(B) shall not apply if the defendant was convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957.

The district judge concluded that because Application Note 3(C) is under the caption "Application of Subsection (a)(2)" it governs only when the base offense level derives from that subsection. Tedder's funds came from a gambling offense, so subsection (a)(1) furnished the base offense level even though, according to the indictment, the sole object of the § 1956(h) conspiracy was a violation of § 1957. That meant, the district court concluded, that Application Note 3(C) dropped out of

the picture, because subsection (a)(2) had not been used to generate the base offense level.

The problem is that the substance of Application Note 3(C) -- the rule that the two-level enhancement under subsection (b)(2)(B) does not apply if the "sole object of [the charged] conspiracy" is money laundering -- includes some prosecutions that lead to the use of subsection (a)(1) as well as all prosecutions in which resort to the fallback subsection (a)(2) is required. It is hard to imagine why application of the rule in Note 3(C) should turn on which subdivision of subsection (a) was used to derive the base offense level: the United States offers no reason in its appellate brief, and the Sentencing Commission was silent on the subject. The other five sub-parts of Application Notes 2 and 3 explicitly refer to subsection (a)(1) or (a)(2); Note *844 3(C) alone does not, and its text suggests a more general application. It is hard to resist the feeling that someone hit the tab key and produced an indent (and hence a subsection (C)) when a new Application Note under its own heading would have been called for.

Our job is to interpret and apply the enacted rules rather than to improve on them. But interpretation covers only the rules' text. Titles, headings, and captions may help disambiguate adopted texts, but they are not themselves rules of law. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 308-09, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998). The text of Application Note 3(C) is unambiguous and covers Tedder's situation; consideration of its heading not only would not help us to under-

stand the language but also would defeat its evident purport. We read Application Note 3(C) to say that the Sentencing Commission has decided *not* to use whatever leeway it possesses to prescribe different penalties for money laundering and money-laundering conspiracies, but instead wants courts to impose the same punishment for these two offenses. (We say "whatever" leeway advisedly. Section 1956(h) provides that money-laundering conspirators are "subject to" the same sentence as those who commit the substantive offense, and our reading of the Note 3(C) means that we need not decide whether "subject to" just incorporates a maximum penalty from elsewhere or instead means that conspirators must receive the same sentence as those who complete the crime. Cf. *United States v. Haehle*, 227 F.3d 857, 862 (7th Cir. 2000); *United States v. Monem*, 104 F.3d 905, 907-08 (7th Cir. 1997).) Throughout the Sentencing Guidelines inchoate offenses either are treated identically to the corresponding substantive crimes, or are treated as less serious. See U.S.S.G. § 2X1.1. To repeat, the prosecutor does not contend that the Sentencing Commission made a specific decision to depart from that norm for § 1956(h), or that it would have had any reason to do so. So Application Note 3(C) applies, which leads to an offense level of 21 rather than 24 for Tedder.

Whether this conclusion will benefit Tedder in the end is a question for the district judge. *Booker* provides district judges with additional discretion, so on remand the judge might reimpose the 60-month sentence if she thinks it the most appropriate response to Tedder's crimes and risks of recidivism; appellate review after

Booker is for reasonableness. But our holding makes the range of 37 to 46 months' imprisonment available without any need to justify departure from the Guidelines.

The judgment is affirmed except with respect to the term of imprisonment. That aspect of the judgment is vacated, and the case is remanded with instructions to resentence Tedder in light of *Booker* and this opinion.

APPENDIX B

2003 WL 23204849, Not Reported in F.Supp.2d

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,
v. OPINION AND ORDER
DAVID HAMPTON TEDDER, 02-CR-0105-C-01
Defendant.

Daniel J. Graber, for Plaintiff.
David B. Smith, Alexandria, VA, for Defendant.

CRABB, J.

*1 Pursuant to Fed.R.Crim.P. 29, defendant David Hampton Tedder has filed a motion for a judgment of acquittal on count seven of the indictment, in which the government seeks forfeiture of the amounts of money defendant laundered in violation of 18 U.S.C. § 1957. The jury hearing his case found him guilty of this count and found that the amount of money subject to forfeiture was $7,288,090.49. Defendant argues that a judgment of acquittal should be entered because (1) the government failed to provide notice in the indictment that it was seeking a personal money judgment; (2) the government failed to prove that defendant obtained any of the alleged proceeds of the conspiracy to launder money; (3) the government failed to prove that it was

reasonably foreseeable to defendant that his co-conspirators would obtain $7,288,090.49 in forfeitable proceeds; (4) the government failed to address the safe harbor language of 18 U.S.C. § 982(b)(2) ; and (5) the government failed to prove that the tainted property was rendered unavailable for forfeiture as a result of any act or omission of the defendant, as required by § 982(b)(1). In addition, defendant contends that even if each movement of funds constitutes a separate incident of money laundering, it would be impermissible double-counting for the government to add together all the money involved in each transaction when seeking forfeiture. In other words, if defendant moved the same $11,000 from one bank to another and then to another, the amount of money that could be forfeited could be no more than $11,000, plus any interest earned on the $11,000. According to defendant, the government could not seek $33,000 in forfeiture, simply because the initial $11,000 was involved in three money laundering transactions.

I conclude that defendant is not entitled to a judgment of acquittal but that the amount he must forfeit must be limited to the funds turned over to him by his coconspirators. For forfeiture purposes, those funds cannot be multiplied to reflect the fact that he laundered the same money more than once.

1. Failure to allege intent to seek personal money judgment

The indictment charged defendant with one count of conspiracy to commit violations of the wire wagering act, 18 U.S.C. § 1084, one count of conspiracy to

launder money in violation of 18 U.S.C. § 1957 and four counts of the substantive offense of money laundering. In the last count, count seven, the government sought forfeiture of the property involved in the laundering offenses and any property traceable to such property, pursuant to 18 U.S.C. § 982(a)(1) , which allows the government to seek forfeiture of property from any person convicted of an offense in violation of § 1957. Alternatively, the government sought forfeiture of any other property belonging to defendant up to the value of the forfeitable property, a course authorized under 21 U.S.C. § 853(p), if the property could not be located or had lost substantial value. The indictment does not say anything about seeking a money judgment against defendant personally for any portion of the laundered money. Defendant contends that this omission prevents the government from obtaining such a judgment against him.

*2 The Court of Appeals for the Seventh Circuit has held that a criminal forfeiture order may take the form of a personal money judgment against a defendant, United States v. Baker, 227 F.3d 955, 970 (7th Cir. 2000); see also United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999) (criminal forfeiture order may take form of in personam judgment, forfeiture of assets or forfeiture of substitute assets); United States v. Voigt, 89 F.3d 1050, 1088 (3d Cir. 1996); United States v. $814,254.76 in U.S. Currency, 51 F.3d 207, 210 (9th Cir. 1995), so the only question is whether a defendant can be held liable personally for a money judgment when the indictment gives no explicit notice of such a possibility. Defendant does not cite any case requiring such

notice, whereas at least one court has held explicitly that the government is not required to advise the defendant in the indictment that he might be subject to a cash forfeiture if the assets subject to forfeiture cannot be found. United States v. Navarro-Ordas, 770 F.2d 959, 969 n.19 (11th Cir. 1985).

I conclude that so long as the defendant has a fair chance to contest the amount of loss, neither due process nor Fed.R.Crim.P. 7(c) requires the government to give specific notice of the possibility of a personal money judgment in the indictment. (Fed.R.Crim.P. 32.2 requires the government to give notice of the possibility of forfeiture in the indictment; defendant does not suggest that the government did not comply with this requirement.)

2. Proof that defendant handled property in course of offense

Under Fed.R.Crim.P. 32.2(b), the government must establish a nexus between the property to be forfeited and the offense. As I understand defendant's argument, he is not contending that the government's proof fell short in this respect, but rather that the government did not establish a sufficient nexus between him and the proceeds from the money laundering conspiracy to justify a forfeiture of his property. He argues that "[t]he government has not proffered sufficient evidence that Tedder obtained or owned any of the alleged proceeds of Gold Medal." Def.'s Rule 29 Mot., dkt. # 140, at 4.

In support of this argument, defendant cites a district court opinion from the Eastern District of North

Carolina, United States v. Barajas, 200 F.Supp.2d 575 (E.D.N.C. 2002). Defendant contends that Barajas requires the government to prove that at some time he obtained or owned property involved in the forfeiture. Not only is this decision of no precedential value, it is based on different facts and a different kind of conspiracy. In Barajas, the government had sought to forfeit property derived from the defendant's involvement in a conspiracy to distribute marijuana; the district court held that the government had failed to adduce evidence connecting the defendant to any property used or intended to be used to commit a crime or to facilitate the commission of a crime or to show that he had obtained any illegal proceeds from the crime.

*3 In this case, the government has produced substantial evidence to prove that defendant was involved directly in the laundering of money from the unlawful activity of offshore gaming, including money from Gold Medal Sports. He advised his co-conspirators where to "invest" their money and, through his so-called law firm made the arrangements for the money transfers. Not only that, he diverted millions of dollars belonging to his co-conspirators into private accounts that he used for payment of his personal, family and household expenses. This suffices to prove the requisite nexus between defendant and the proceeds of the conspiracy.

3. Foreseeability of amount of forfeitable proceeds

Citing United States v. Saccoccia, 823 F.Supp. 994, 1004-07 (D.R.I. 1993), aff'd, 58 F.3d 754 (1st Cir. 1995), defendant contends that the government is

required to prove that it was reasonably foreseeable to him that his co-conspirators would obtain $7,288,090.49 in forfeitable proceeds. This argument requires little discussion. The government proved in considerable detail how closely defendant worked with his co-conspirators and how involved he was in investing their money and that of their companies. There is no question but that he was well aware of how much his co-conspirators were deriving from their illegal gaming operation.

4. Defendant's eligibility for safe harbor provision in 18 U.S.C. § 982(b)(2)

Defendant argues that he qualifies for the safe harbor provision in 18 U.S.C. § 982(b)(2), which prevents the government from seeking forfeiture of substitute assets in place of the actual laundered property from any defendant who acted merely as an intermediary and who handled property to be laundered but did not retain any of it. This provision does not apply if, in committing the charged offense, the defendant conducted three or more separate transactions involving a total of more than $100,000 in any twelve-month period. Defendant's retention of laundered funds for his own purposes shows that he did not act merely as an intermediary; his supervision and direction of his co-conspirators' investments show that he conducted three or more separate transactions of more than $100,000.

5. Unavailability of tainted property

Defendant thinks that the government should have to show at this point that the tainted property has been

made unavailable for forfeiture as a result of an act or omission of defendant. The procedures for forfeiture are set out in 21 U.S.C. § 853. They permit the forfeiture of substitute property if the government can show that because of an act or omission of the defendant, it has had difficulty locating the forfeitable property, if the property has been transferred or sold to a third party, placed beyond the court's jurisdiction, commingled with other property that cannot be divided without difficulty or has diminished substantially in value. It would be premature to require the government to make this showing before it has attempted to trace the tainted property and failed. However, it will have to make the showing before it can seize and retain substitute assets.

6. Double counting

*4 The government maintains that it is entitled to consider as forfeitable the entire amount of money that was "involved" in the money laundering activity, so that it may count the same money more than once if it was involved in more than one transaction. 18 U.S.C. § 982 authorizes the forfeiture of property "involved in a transaction or attempted transaction," but I am not persuaded that this language permits the government to multiply the amounts to be forfeited by the number of transactions. It is legitimate for the government to take any profits earned on laundered money, United States v. Check No. 25128, 122 F.3d 1263 (9th Cir. 1997), commissions and fees paid to the launderer and any property used to facilitate the money laundering offense, including "clean" funds used to cover the deposit of dirty funds, Baker, 227 F.3d 955. It is another thing for

the government to claim the right to funds calculated to reflect the number of times they were moved around.

If defendant moved $11,000 three times to three different bank accounts, he did not possess or handle a total of $33,000, any more than my transferring $10 from my wallet to my bank account means that I now possess $20 or that I "gained" an extra $10 through the transaction. The purpose of the forfeiture laws is to deprive the perpetrator of his ill-gotten gains. United States v. Genova, 333 F.3d 750, 761 (7th Cir. 2003) ("forfeiture is gain based"). In my hypothetical, the actual gain to defendant would not have amounted to $33,000. Defendant did not gain from the transfers other than by receiving commissions or fees for the transfers, which are properly included in calculating the amount for forfeiture, and he did not increase the amount of money he hid from creditors, including taxing authorities, simply because he facilitated its movement from one account to another.

It is significant that the government has been unable to find any case involving forfeiture in which a court has counted the same money twice or more to reflect multiple transactions. Defendant has not found any holding to the contrary, but he has cited two cases, Baker, 227 F.3d 955, and United States v. Trost, 152 F.3d 715, 721 (7th Cir. 1998), in which the court of appeals noted that the district court had eliminated amounts it thought were double counted. Although the cases do not identify the nature of the deductions being made, they are worth noting because the court of appeals did not suggest that the district courts should not have eliminated double counted amounts.

Among the cases the government cites is United States v. Li, 973 F.Supp. 567 (E.D.Va. 1997), which concerned only the determination of the sentencing guideline level, and Check No. 25128, 122 F.3d 1263, a case in which the court of appeals upheld the forfeiture of a check representing a refund of money the city police had seized as drug proceeds during a search of the defendant's home. The defendant sued the state for suppression of the evidence seized in a search and won dismissal of the criminal case against him, whereupon he sued the city for a return of the funds. The city refused to return the money until ordered to do so by the state supreme court. At the cusp of victory, the defendant saw it snatched from him when the federal government seized the check for the returned funds on the ground that it was money traceable to the original drug proceeds. Id. at 1265.

*5 Although the government says that Check No. 25128 is a case in which the defendant asserted "double-counting," there is no reference to double counting in the opinion. The case was about tracing. Defendant objected to the seizure on the ground that the check no longer represented drug proceeds but comprised the proceeds of his successful action against the city for conversion. The court of appeals found that the drug proceeds did not change their nature just because they were returned as a result of a court order finding unlawful conversion, but remained the proceeds of illegal drug transactions.

The government is entitled to a judgment of forfeiture of all the money that Gold Medal, its associated companies or any of the individual co-conspirators

turned over to defendant or to a financial institution or corporation at defendant's suggestion (plus fees and commissions paid to defendant plus any earnings on the invested money), but it is not entitled to an order permitting it to seize additional money reflecting subsequent transfers of the same money by defendant. To determine the amount that is subject to forfeiture, I will hold a hearing on August 4, 2003, at which it will be the government's burden to show how much of the jury's verdict reflected money that was not double counted. It was the government that insisted, over defendant's vigorous objections, that the law supported forfeiture of all amounts that had been laundered, even if it was the same money being laundered on several occasions. Now that the government cannot sustain its contention, it will have to prove how much of the jury's verdict of $7,288,090.49 is supportable.

7. Deduction of prior forfeitures

Defendant would like to have credit for Gold Medal's forfeiture of $3,247,859.75 but he has no basis for seeking the credit. Gold Medal pleaded guilty to a forfeiture under the Racketeer Influenced and Corrupt Organizations law, 18 U.S.C. § 1961-1968, and forfeited the funds as part of its plea agreement. It was never charged with conspiring with defendant to launder money. Therefore, it has no joint and several liability with defendant for illegally gained proceeds from money laundering.

Defendant cites the concurring opinion in United States v. Covey, 232 F.3d 641, 650 (8th Cir. 2000), to support his argument that he should be given credit for

the money paid by Gold Medal Sports. In that case, the concurring judge suggested in dictum that the government should not be permitted to recover the same money twice from two wrongdoers, one of whom is convicted of drug dealing and the other of money laundering when the money launderer exchanges the drug proceeds for "clean" cash and the drug dealers invest it in a legitimate business. Not only is this dictum, but in Covey, the two wrongdoers were charged in the same case and the parties agreed that the co-conspirators were jointly and severally liable for forfeitures.

8. Excessive fines

*6 Defendant has argued that the forfeiture verdict is excessive under the Eighth Amendment. As the government points out, this argument is premature. No order of forfeiture has been entered and no final order will be entered until sentencing. However, I will note that defendant has almost no chance of prevailing on his argument. Permitting forfeiture of the amounts of money defendant handled is an appropriate response to his criminal conduct and not an excessive fine, particularly when the evidence at trial showed that defendant had invested more than $4,000,000 belonging to Duane Pede, Jeff D'Ambrosia and Gold Medal in his corporation, Challenge Realty, and had then taken more than $5,000,000 in distributions for personal use from this corporation in 2000 and 2001.

9. Jury instructions

Defendant challenges some of the jury instructions given in connection with the forfeiture count. First, he

argues that it was improper to tell the jury that money might be involved in a money laundering violation if it was commingled with those proceeds at the time the financial transaction took place. Although the government may seize untainted funds commingled with dirty funds if it can prove that the clean funds were used to hide the dirty ones, the government will have to prove at the hearing the basis for its contention that it can seize clean funds. It will not be enough for it to show simply that the money has been commingled with dirty funds.

Second, defendant objects to the instruction that property is forfeitable as traceable to property involved in money laundering even if some untainted funds were also used to purchase, improve or maintain the property. If the government seeks to forfeit traceable property, it will have to prove the source of the property and demonstrate how much is forfeitable as previously laundered.

Third, defendant argues that he should be entitled to deduct the costs of his criminal business. He cites Genova, 333 F.3d 750, for this proposition without acknowledging that in Genova, the court was addressing the deductibility of the legitimate costs of running a law firm from kickbacks that the senior partner of the firm paid to Genova. In defendant's case, however, the co-conspirators sent money to The Legal Advantage and to Challenge Realty for the sole purpose of laundering. Neither entity incurred any costs in connection with the charged crimes for any purpose other than facilitating the laundering. United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002), does not require a different conclusion. In that case, like this one, the defendants were charged

with both gambling offenses and money laundering. The question was whether "proceeds" in the money laundering statute, § 1956, referred to the gross or net proceeds of gambling operations. The government argued that it referred to gross proceeds and covered amounts that the defendants paid to meet the expenses of their business, so that the defendants violated the money laundering statute every time it paid for the lease of a video poker machine or paid a percentage of the coins collected to the owners of the premises on which the machines stood. The court rejected this argument, noting that if "proceeds" in § 1956(a)(1) did not mean net income, "the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." Id. "By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise." Id. at 477.

ORDER

*7 IT IS ORDERED that defendant David Hampton Tedder's motion for judgment of acquittal on count seven of the indictment is DENIED. FURTHER, IT IS ORDERED that a hearing will be held on August 6, 2003, at 9:00 a.m. to determine the amount of money that is properly the subject of a forfeiture order. If the government wants to use this hearing as an opportunity to demonstrate why it is entitled to seek forfeiture of

substitute assets, it should so advise the court and opposing counsel.

Entered this _*28th*_ day of July, 2003.

BY THE COURT:

/s/_____
BARBARA B. CRABB
District Judge

2

No. 05-312

NOV 10 2005

In the Supreme Court of the United States

DAVID HAMPTON TEDDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the order of criminal forfeiture in this case violated petitioner's Sixth Amendment right to a jury trial.

2. Whether the court of appeals correctly rejected petitioner's contention that the amount he was required to forfeit should be reduced by the amount that petitioner's co-conspirators were required to forfeit as a result of a judicial order entered in another case.

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In the Supreme Court of the United States

No. 05-312

DAVID HAMPTON TEDDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 403 F.3d 836. The opinion of the district court denying petitioner's motion for judgment of acquittal on the forfeiture count (Pet. App. B1-B14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2005. On June 24, 2005, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including September 3, 2005, and the petition was filed on September 6, 2005 (the Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted of conspiring to violate the wire wagering act, 18 U.S.C. 1084, in violation of 18 U.S.C. 371; conspiring to launder money, in violation of 18 U.S.C. 1956(h); and two counts of money laundering, in violation of 18 U.S.C. 1957. The jury also rendered a criminal forfeiture verdict under 18 U.S.C. 982 (2000 & Supp. II 2002). Petitioner was sentenced to concurrent terms of 60 months of imprisonment on each count, was subjected to fines totaling more than $1.06 million, and was ordered to forfeit $2.77 million in proceeds from his illegal money-laundering activities. The court of appeals affirmed petitioner's convictions and the order of forfeiture, but the court vacated petitioner's sentence and remanded for resentencing. Pet. App. A1-A17; Pet. 7.

1. Petitioner is a former attorney who described himself as an expert in asset protection and estate planning. In March 1997, petitioner entered into a conspiracy with his clients Duane Pede and Jeffrey D'Ambrosia. Pede and D'Ambrosia were the co-founders and operators of Gold Medal Sports (GMS), an illegal offshore sports-bookmaking operation incorporated in the island of Curacao, Netherlands Antilles. Petitioner assisted Pede and D'Ambrosia by advising and recommending deferred-compensation packages, directing the formation of shell corporations, establishing accounts used in laundering profits from the sports-book operation to pay vendors and bettors, and sheltering GMS money in offshore banks in the Bahamas. Each time money was moved from GMS to a subsidiary entity or a new bank, an act of money laundering occurred. Petitioner recommended business changes to encourage

what would appear to be greater "arms-length" transactions in an effort to insulate Pede and D'Ambrosia from liability, and to make the money flowing in and out of GMS seem more legitimate. Presentence Investigation Report (PSR) paras. 15, 20, 21, 22; Pet. App. A3.

During its three-and-a-half years of operation, GMS collected approximately $402.7 million in wagers. A significant portion of the net profits was placed into deferred compensation programs established by petitioner. From August 1996 through April 2002, petitioner personally assisted in opening accounts for GMS and brokering a $2.4 million transfer of GMS profits from Orco Bank to an account at Surety Bank & Trust in the Bahamas. Pede and D'Ambrosia funneled a total of more than $4 million of GMS profits to petitioner. PSR paras. 19, 39, 42.

2. Following a seven-day trial, a jury found petitioner guilty of two conspiracy counts, including one count of conspiracy to commit money laundering, and two substantive money-laundering counts. Gov't C.A. Br. 4. The jury also returned a special verdict of forfeiture, finding that funds in the amount of $7,288,090.49 were "involved in and [were] traceable to property that was involved in the money laundering conspiracy." C.A. App. 118. Before sentencing, the district court concluded that the jury verdict had overstated the amount subject to forfeiture by double-counting certain funds, and the court reduced the forfeiture to approximately $2.77 million. Pet. 7; Pet. App. A8. Approximately $1.7 million was ordered forfeited from Challenge Realty, one of the entities petitioner had created to hold the venture's profits, and the rest stood "as a personal money judgment against [petitioner] to be satisfied out of as-

sets that he had purchased with the tainted proceeds." *Ibid.*

3. Petitioner appealed, arguing, *inter alia*, that the district court's forfeiture order was invalid. The court of appeals affirmed petitioner's convictions and the forfeiture ordered by the district court, while remanding for redetermination of petitioner's prison sentence in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005). Pet. App. A1-A17.

a. Petitioner contended that the district court had violated his Sixth Amendment right to jury trial when the court determined the amount subject to forfeiture rather than convening a new jury to make that finding. Pet. App. A8; Pet. C.A. Br. 46, 50-52. The court of appeals rejected that argument. Pet. App. A8-A9. The court explained that, under *Libretti* v. *United States*, 516 U.S. 29, 49 (1995), the constitutional right to a jury trial "does not apply to forfeitures." Pet. App. A8. The court of appeals further observed that, because "[t]here is no statutory maximum forfeiture," this Court's subsequent decisions in *Booker* and in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), do not supersede *Libretti*'s holding. Pet. App. A8. The court also held that the jury-trial right conferred by Federal Rule of Criminal Procedure 32.2 "is limited to the nexus between the funds and the crime," and that "Rule 32.2 does not entitle the accused to a jury's decision on the amount of forfeiture." *Id.* at A8-A9.

b. Petitioner further contended that his monetary obligation under the forfeiture order should be reduced by the amount (approximately $3.25 million) that had already been forfeited by Pede and D'Ambrosia after the sale of GMS. See Pet. App. A9; Pet. C.A. Br. 53. The court of appeals rejected that claim. Pet. App. A9-

A10. The court acknowledged that, "if Pede and D'Ambrosia already ha[d] coughed up the full profits of the venture," then petitioner's own funds could not properly be regarded as traceable proceeds of the unlawful conduct and therefore would not be subject to forfeiture. *Id.* at A9. The court of appeals concluded, however, that the forfeiture order entered by the district court did not result in any double-counting of funds because "[t]he district judge's concrete findings establish that the $2.8 million forfeited in this prosecution is distinct from the assets that Pede and D'Ambrosia have surrendered." *Id.* at A10. Because the $2.8 million that petitioner was ordered to forfeit represented "only proceeds that came to rest with [petitioner] or one of the entities he controls," the court of appeals found "no reason to disturb the district court's disposition of the forfeiture question." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 11-20) that the district court violated his Sixth Amendment right to jury trial by determining the amount that petitioner was required to forfeit. Petitioner further argues (Pet. 16-17) that the court of appeals' resolution of the Sixth Amendment question conflicts with decisions of two other circuits. Those contentions lack merit and do not warrant further review.

a. Federal Rule of Criminal Procedure 32.2(b)(4) provides that, "[u]pon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." This Court has squarely held, however, that "the right to a jury verdict on for-

feitability does not fall within the Sixth Amendment's constitutional protection." *Libretti* v. *United States*, 516 U.S. 29, 49 (1995). The Court in *Libretti* explained that a criminal forfeiture order is properly regarded as "an aspect of sentencing," and it relied on prior decisions holding that "a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed." *Ibid.*

In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held, as a matter of federal constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Several courts of appeals have considered whether the rule announced in *Apprendi* and subsequently applied in *Blakely* v. *Washington*, 542 U.S. 296 (2004), and in *United States* v. *Booker*, 125 S. Ct. 738 (2005), casts doubt on the *Libretti* Court's conclusion that there is no Sixth Amendment right to trial by jury on questions of criminal forfeiture. Every court of appeals to address the question has held that *Apprendi*, *Blakely*, and *Booker* do not cast doubt on *Libretti*'s application of Sixth Amendment principles to the forfeiture context. See, *e.g.*, Pet. App. A8; *United States* v. *Hall*, 411 F.3d 651, 654-655 (6th Cir. 2005); *United States* v. *Fruchter*, 411 F.3d 377, 382-383 (2d Cir. 2005); *United States* v. *Shryock*, 342 F.3d 948, 991 (9th Cir. 2003), cert. denied, 541 U.S. 965 (2004); *United States* v. *Keene*, 341 F.3d 78, 85-86 (1st Cir. 2003); *United States* v. *Gasanova*, 332 F.3d 297, 301 (5th Cir.), cert. denied, 540 U.S. 1011 (2003); *United States* v. *Najjar*, 300 F.3d 466, 485-486 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); *United States* v. *Vera*, 278 F.3d 672, 673 (7th Cir.), cert. denied,

536 U.S. 911 (2002); *United States* v. *Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001) (per curiam); *United States* v. *Corrado*, 227 F.3d 543, 550 (6th Cir. 2000).[1] In *Booker*, moreover, this Court identified 18 U.S.C. 3554, which authorizes the sentencing court in specified categories of prosecutions to impose an order of criminal forfeiture, as one of the Sentencing Reform Act of 1984 provisions that remain "perfectly valid." 125 S. Ct. at 764.

As the Second Circuit has explained, "*Blakely* and *Booker* address determinate sentencing regimes." *Fruchter*, 411 F.3d at 383 (citing *Blakely*, 542 U.S. at 308; *Booker*, 125 S. Ct. at 749-750). By its terms, the rule announced in *Apprendi* applies only to a factual determination that "increases the penalty for a crime beyond the prescribed statutory maximum." 530 U.S. at 490. The amount of money or other property that a federal criminal defendant may be required to forfeit, however, is not subject to any statutory maximum. The holdings of *Apprendi*, *Blakely*, and *Booker* are inapplicable here because "[a] judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum. Criminal forfeiture is, simply put, a different animal from determinate sentencing." *Fruchter*, 411 F.3d at 383.[2]

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[1] The Third Circuit sua sponte recently granted rehearing en banc to consider, *inter alia*, the question "[w]hether the decision of the Supreme Court of the United States in *United States v. Booker*, 125 S. Ct. 738 (2005) applies to forfeiture." Order of Sept. 19, 2005, *United States* v. *Leahy*, Nos. 03-4490, et al. Reargument before the en banc court was held on November 1, 2005.

[2] Petitioner also seeks to rely separately on the Due Process Clause to argue that, even if no jury-trial right applies to criminal-forfeiture

b. Contrary to petitioner's contention (Pet. 16-17), the court of appeals' resolution of the question presented here does not conflict with either *United States* v. *Bornfield*, 145 F.3d 1123 (10th Cir. 1998), cert. denied, 528 U.S. 1139 (2000), or *United States* v. *Gilbert*, 244 F.3d 888 (11th Cir. 2001). In *Bornfield*, the jury rendered a special verdict of forfeiture with respect to the funds contained in the defendant's business account, even though the money-laundering offense for which the defendant was convicted involved only his personal account. See 145 F.3d at 1137-1138. The court of appeals held that the jury's special verdict, which apparently resulted from confusion between the account numbers of the business and personal accounts, "is clear error because the jury could not legally order the forfeiture of funds contained in Bornfield's business account." *Id.* at

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determinations under the Sixth Amendment, the government must prove forfeitability beyond a reasonable doubt. Pet. 15-16, 19-20. Petitioner's briefs in the court of appeals did not raise that claim, see Pet. C.A. Br. 45-55 (discussion of forfeiture issue); Pet. C.A. Reply Br. 18-21 (same), and the question therefore is not properly presented here. In any event, petitioner cites no decision of this Court that has required proof beyond a reasonable doubt in a criminal case with respect to a finding as to which no jury trial is required by the Sixth Amendment. To the contrary, this Court has treated the two requirements as interlinked. See, *e.g.*, *United States* v. *Gaudin*, 515 U.S. 506, 510, 522-523 (1995). The cases cited by petitioner (Pet. 19-20) all predated this Court's decision in *Libretti*. In most of those cases, moreover, the applicability of a reasonable-doubt standard was either assumed or conceded. The only one of those cases in which the point was actively contested was *United States* v. *Pelullo*, 14 F.3d 881 (3rd Cir. 1994), and the court in that case specifically limited its holding to criminal forfeitures under RICO. See *id.* at 903 (acknowledging but distinguishing Third Circuit's prior holding that preponderance standard applies to determinations of forfeitability under the Continuing Criminal Enterprise Act).

1138. The court further held that, absent a valid initial order of forfeiture, the district court could not order forfeiture pursuant to the substitute-assets provisions of 18 U.S.C. 982(b)(1)(A) and 21 U.S.C. 853(p). 145 F.3d at 1138-1139.

In *Gilbert*, the Eleventh Circuit concluded that the jury's forfeiture verdict was invalid because it encompassed an entire business, rather than simply the defendants' ownership interests in that business, notwithstanding uncontradicted evidence that part of the business was owned by an innocent party. 244 F.3d at 920-921. The court of appeals further held that the district court could not correct the error by entering an order of forfeiture limited to the defendants' ownership interests. *Id.* at 922. The court explained that, "[s]ince the jury's verdict reached beyond those assets that were legally forfeitable under the applicable statute, the verdict was invalid. Without a valid *verdict* of forfeiture, the district court cannot properly enter an *order* of forfeiture unless the defendant waives his right to a jury trial on that issue." *Ibid.*

Because neither *Bornfield* nor *Gilbert* was based on the Sixth Amendment, those decisions cannot reasonably be thought to conflict with the Seventh Circuit's disposition of the constitutional question in this case. And because current Federal Rule of Criminal Procedure 32.2 was not in effect at the time of the forfeitures at issue in *Bornfield* and *Gilbert*, the courts in those cases had no occasion to discuss that Rule's allocation of authority between the trial court and the jury.

In any event, the defect in the forfeiture verdict rendered by petitioner's jury is significantly different from the defects involved in *Bornfield* and *Gilbert*. In each of those cases, the jury's forfeiture verdict encompassed

discrete assets that had no legally sufficient nexus to the offenses of conviction. No such error occurred in this case; rather, the district court found that the jury had incorrectly computed the *amount* of the forfeitable funds by double-counting monies used in more than one transaction. The jury's computation of the forfeitable amount was apparently based on the premise, which the district court rejected, that the jury could "count the same money more than once if it was involved in more than one transaction." Pet. App. B7; see *id.* at B7-B10. Pursuant to Federal Rule of Criminal Procedure 32.2(b)(1), the district court conducted a hearing to "determine the amount of money that [petitioner] will be ordered to pay," at which it placed upon the government the "burden to show how much of the jury's verdict reflected money that was not double counted," Pet. App. B10. But all of the funds ultimately ordered to be forfeited had been properly found by the jury to have the requisite nexus to the offenses of conviction.

2. Petitioner contends (Pet. 21-30) that the amount he was required to forfeit should have been offset by the sum forfeited by Pede and D'Ambrosia upon the sale of GMS. Because the amount forfeited by Pede and D'Ambrosia was greater than the amount that petitioner was ordered to forfeit, the effect of such an offset would have been to eliminate petitioner's forfeiture obligation altogether. See Pet. App. A8-A9. Petitioner argues (Pet. 21) that, as a result of the lower courts' refusal to approve an offset, the government has obtained an impermissible "double recovery of the same property." Petitioner's claim lacks merit and raises no significant legal issue warranting this Court's review.

In holding that an offset was inappropriate in this case, the court of appeals accepted petitioner's basic

legal contention that the government is not entitled to forfeiture of more than the total proceeds of the various defendants' unlawful activities. The court explained that, "[i]f the United States already has all of the boodle, having collected it from Pede and D'Ambrosia, then the funds in [petitioner's] hands * * * cannot also be traceable proceeds." Pet. App. A9. The court concluded, however, that "[t]he district judge's concrete findings establish that the $2.8 million forfeited in this prosecution is distinct from the assets that Pede and D'Ambrosia have surrendered." *Id.* at A10. To the extent that petitioner challenges the court of appeals' application of the relevant legal principles to the particular record in this case, his factbound claim provides no basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2005

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No. 05-312

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID H. TEDDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

David Hampton Tedder has petitioned this Court for a writ of certiorari to review the judgment and opinion of the Seventh Circuit. The court below held that he was not unconstitutionally deprived of his right to jury trial on a criminal forfeiture claim, arising out of a conviction for conspiracy to commit money laundering. 18 U.S.C. § 1956(h). The respondent does not deny the importance of the question. It simply asserts that a number of circuits have decided the point more or less in keeping with the decision by Judge Easterbrook for the Seventh Circuit in this case. But the respondent does not attempt to defend in any way the reasoning or conclusion of those courts against any of the arguments articulated in the Petition. The Brief in Opposition takes a different tack: it refuses to address the question presented,[1] and instead advances several arguments -- many of them never advanced by the government in the trial court or in the court of appeals, nor by either court *sua sponte* -- in support of its theme that the question proposed in the Petition is not presented on the facts and record of this case. Because the respondent's attempts to avoid the question presented miss the mark, the petition should be granted.

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[1] The respondent proposes a revision of the Questions, Br.Opp. (i), to make them seem fact-bound and case-specific, and the matter accordingly less worthy of this Court's attention. The Questions Presented in the Petition, of course, are the ones the Court would and should address if the writ is granted.

The brief in opposition ("Br.Opp.") proposes two reasons why certiorari should be denied. First, the respondent asserts the matter was settled in *Libretti v. United States*, 516 U.S. 29, 49 (1995), and that *Apprendi v. New Jersey*, 530 U.S. 446 (2000), and its progeny do not overrule *Libretti* because they only apply to "determinate sentencing regimes." Br. Opp. 5-7. Second, the respondent claims that the conflict with two other Circuits which petitioner identifies over the trial court's power to revise a jury verdict on the amount of a forfeiture does not amount to a circuit split. Br.Opp. 8-10. The second point raised in the petition arises out of the odd manner in which the issue was resolved by the court below. The underlying, interrelated aspects of the law of forfeiture are been the subject of significant misinterpretations by numerous courts. Pet. 21-30. Yet the respondent disregards everything that petitioner has to say about why the Court should address these issues. Br.Opp. 10-11. The government's contentions are not persuasive and do not justify denial of the petition.

1. The Sixth Amendment issue is important and should be resolved by this Court, even though no Circuit has yet addressed it correctly.

The petition in this case demonstrates that none of the Circuits -- most of them following the lead of the Court below, as articulated in earlier cases -- have properly applied this Court's precedents to the problem of adding criminal forfeiture as part of a criminal sentencing. The facts giving rise to the conviction -- that is, the elements of the offense -- do not authorize the

imposition of a forfeiture penalty unless additional facts are proven. In this case, those additional facts are not, as the respondent and the circuits attempt to suggest, that certain property was actually "involved in" the money laundering conspiracy which constituted the proceeds of the co-defendants' illegal gambling business, and that petitioner Tedder had a present interest in some or all of that property (or other "property traceable to such property"). 18 U.S.C. § 982(a)(1).

That as many as eight circuits have already failed to apply fairly the principle of *Apprendi*, as explained more recently in *Blakely v. Washington*, 542 U.S. 246 (2004), to the added penalty of criminal forfeiture hardly justifies this Court's staying its hand. The Court has not hesitated before to correct a virtually unanimous trend toward error in the Circuits. See, *e.g.*, *Ratzlaf v. United States*, 510 U.S. 135 (1994) (reversing ten circuits); *McNally v. United States*, 483 U.S. 350 (1987) (same).

In repeating the red herring that "The amount of money or other property that a federal criminal defendant may be required to forfeit, however, is not subject to any statutory maximum," Br.Opp. 7, the respondent simply ignores -- and does not answer -- the petitioner's showing that this formulation misses the point of *Blakely*. It is not so much, in this case, the addition of a higher amount of forfeiture to a lower amount that triggers the right to jury trial, but the addition of *any forfeiture* at all to a sentence which, without proof of additional facts beyond those found by the jury when it rendered the conviction, supports *no* criminal forfeiture.

As stated in the petition:

> It is the offense which authorizes a "statutory maximum" as a result of certain facts' being proved. The offense in question is not "forfeiture"; the offense (in this case, for example) is conspiracy to commit money laundering, 18 U.S.C. § 1956(h). ... Proof of the elements of the ... offense charged ..., without more, implicates a maximum penalty of ten years' imprisonment and a $250,000 fine ..., as well as a special assessment, *id.* § 3013, but not a forfeiture. ... Forfeiture thus increases the maximum sentence otherwise available for the money laundering conspiracy offense, and does so on the basis of proof of additional facts.

Pet. 14-15. To this simple rebuttal of the majority view, the respondent offers no direct response.

The respondent also attempts to invoke this Court's own authority in the matter, but that effort misses the mark. *Libretti* was decided five years prior to *Apprendi*, and has not been cited since. It involved the requirements for a guilty plea, not the constitutional limits on sentencing following a trial. Certainly, a case that turns on the proposition that Sixth Amendment rights are not implicated by a sentencing issue cannot safely be relied upon as decisive today.

The respondent also misconstrues the import of the Court's remark in *United States v. Booker*, 543 U.S. --, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), that 18 U.S.C. § 3554 is "perfectly valid." Br.Opp. 7, *citing* 125 S.Ct. at 764. Of course it is. That statute says only that,

"The Court, in imposing sentence on a defendant who has been found guilty of an offense [under the federal drug or RICO statutes] shall order in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States ...." This law says nothing about the procedures by which the nature and amount of that forfeitable property must have been determined.[2] After a jury properly determines what property a defendant must forfeit criminally, it is still the task of the judge at sentencing to include the forfeiture obligation in the judgment as part of the sentence.

The petitioner here was not afforded a trial by jury on the added facts necessary to increase the available punishment, nor to determine the amount of that penalty. Instead, the district court held a jury trial to determine the total amount of property "involved in" the (conspiracy) offense, with no reference to what interest the defendant might have in that property or anything derived from that property. Although constitutionally inadequate, the district court's initial action comported with Fed.R.Crim.P. 32.2(b)(4). Then, upon realizing it had instructed the jury erroneously in several respects, the district court proceeded to redetermine the verdict without holding a new trial. The latter step conflicted with published authority in two other circuits. *See* Pet. 16-17. That those cases were resolved on the basis that the federal forfeiture statutes require constitutional, rather than unconstitutional, procedures hardly proves

[2] In any event, neither type of forfeiture covered by § 3554 is involved in this case.

that they do not conflict with the decision below. *Compare* Br.Opp. 8-10.

The petition also seeks to have this Court re-establish the reasonable doubt standard for criminal forfeitures. That requirement ordinarily goes hand in hand with a jury trial right, as respondent notes. Br.Opp. 8 n.2. Yet the two are not necessarily intertwined. The respondent complains that "petitioner cites no decision of this Court that has required proof beyond a reasonable doubt in a criminal case with respect to a finding as to which no jury trial is required by the Sixth Amendment." *Id.* That is an odd remark; by focusing on what petitioner cited, and limiting it to "criminal case[s]," the respondent renders its point hollow. After all, this Court's leading authority pointing out the constitutional nature of the reasonable doubt standard is precisely such a case: *In re Winship*, 397 U.S. 358 (1970) (reasonable doubt standard, but not jury trial, guaranteed in juvenile delinquency case).

Thus, while "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated," *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), the two are not identical or inherently interdependent. Contrary to the Solicitor General's suggestion, examples abound. Thus, while no right to jury trial attaches to a petty offense, the burden of proof remains beyond a reasonable doubt. *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632 n.5 (1988). The same is true at a criminal contempt proceed where the punishment imposed does not exceed six months. See *Bloom v. Illinois*, 391 U.S. 194, 205 (1968), quoting *Gompers v. Buck Stove & Range Co.*,

221 U.S. 418, 444 (1911); *cf. United States v. Dixon*, 509 U.S. 688, 696 (1993) (noting the point). Likewise, when a defendant waives his right to trial by jury, the resulting bench trial must nevertheless end in acquittal if the government does not present proof beyond a reasonable doubt. See *Moore v. United States*, 429 U.S. 20, 22 (1976) (per curiam) (calling this an "elementary proposition" and summarily reversing conviction).

The petition explains in detail why the writ should be granted in this case. The respondent fails to persuade otherwise.

2. The respondent's attempts to mask the nature of the second question presented should not prevail.

The respondent opposes a grant of certiorari in this case on petitioner's other issue by ignoring the second Question Presented entirely:

> 2. If, as held by the court below in disagreement with the trial court, the same property, or its value, may not be ordered forfeited criminally from different individuals in separate cases on different statutory bases, may the court of appeals nevertheless affirm a forfeiture judgment entered over such objection on the basis of a rhetorical question (masking a factual assumption) never raised by the government and which the defendant-appellant was never given an opportunity to rebut?

Pet. i. What makes this case interesting and worthy of this Court's review on this point is not "the court of

appeals' application of the relevant legal principles to the particular record in this case," Br.Opp. 11, but rather the unfairness of the court below in deciding the point on the basis of a rhetorical question which is easily answered (*see* Pet. 24-25) but to which appellant was never allowed to give his response.[3] Moreover, as the petition goes on to demonstrate, there are implicated in the question which was thus wrongly pretermitted a number of significant and unresolved issues regarding the proper and constitutional application of the increasingly popular criminal forfeiture remedy.

In pretending that the petition's second point is only a mundane, fact bound complaint, the respondent completely ignores the legal invalidity of the so-called "personal money judgment" forfeiture imposed in this case, which was directly tied to the nature of the district court's error and was made to appear moot by the court of appeals' unfair disposition. Nor does the respondent fail to mention, much less justify, that because the government has never complied with its obligation to notify third parties under 21 U.S.C. § 853(n), the petitioner is left with an order that he "forfeit" not only any tainted property he may possess, but <u>everything</u> he and his family (and a business he was found to control) may own, up to the total value of all forfeitable property

[3] Not only was the determinative point not raised in the government's brief, but it was also not raised from the bench at oral argument. After the decision was rendered, the panel even denied a motion for an extension of time to file a petition for rehearing (in which petitioner sought to raise this point, among others), and then refused to reconsider that ruling.

resulting from the entire conspiracy. This complete disconnection between criminal forfeiture and any actual, forfeitable property in which the particular defendant has an interest, defies the nature of the remedy as described in the applicable statutes.

For these reasons as well, the Court should grant certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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